Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

No. 75-142

In the Supreme Court of the United States

OCTOBER TERM, 1975

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JESUS RODRIGUEZ CINTRON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JURISDICTIONAL STATEMENT AND MOTION TO VACATE

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

WILLIAM L. PATTON,
Assistant to the Solicitor General,

STEPHEN F. EILPERIN,
THOMAS S. MOORE,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JESUS RODRIGUEZ CINTRON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JURISDICTIONAL STATEMENT AND MOTION TO VACATE

OPINION BELOW

The opinion of the district court (App. B, *infra*, pp. 3a-22a) is not yet reported.

JURISDICTION

The judgment of the district court declaring an Act of Congress unconstitutional and enjoining its

enforcement (App. A, *infra*, pp. 1a-2a) was entered on April 7, 1975. Notice of appeal to this Court (App. C, *infra*, p. 23a) was filed on April 30, 1975. On June 19, 1975, Mr. Justice Brennan extended the time for docketing the appeal to and including July 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 11, n. 8.[1]

QUESTION PRESENTED

Whether Congress may constitutionally exclude residents of Puerto Rico, who are not generally subject to federal income tax liability, from eligibility for special old age benefits.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution in pertinent part provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.

Article IV, Section 3, of the Constitution in pertinent part provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

[1] We do not here invoke jurisdiction under 28 U.S.C. 1253, because there may be some doubt, under this Court's decision in *Salfi*, whether a three-judge court is properly convened at the request of an individual plaintiff whose standing rests upon a particular denial of benefits to him.

The Fifth Amendment of the Constitution in pertinent part provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 228 of the Social Security Act, as added, 80 Stat. 67, 42 U.S.C. 428, provides for the payment of special old age benefits to certain individuals that are unable to meet the requirements for insured status under the Social Security Act. Section 228 (a), 42 U.S.C. 428(a), provides:

> Every individual who—
>
> (1) has attained the age of 72,
>
> (2)(A) attained such age before 1968, or (B) has not less than 3 quarters of coverage, whenever acquired, for each calendar year elapsing after 1966 and before the year in which he attained such age,
>
> (3) is a resident of the United States (as defined in subsection (e) of this section), and is (A) a citizen of the United States or (B) an alien lawfully admitted for permanent residence who has resided in the United States (as defined in section 410 (i) of this title) continuously during the 5 years immediately preceding the month in which he files application under this section, and
>
> (4) has filed application for benefits under this section,

shall (subject to the limitations in this section) be entitled to a benefit under this section for each month beginning with the first month after September 1966 in which he becomes so entitled to such benefits and ending with the month preceding the month in which he dies. No application under this section which is filed by an individual more than 3 months before the first month in which he meets the requirements of paragraphs (1), (2), and (3) shall be accepted as an application for purposes of this section.

Section 228(e), 42 U.S.C. 428(e), provides:

The benefit to which any individual is entitled under this section for any month shall not be paid if, during such month, such individual is not a resident of the United States. For purposes of this subsection, the term "United States" means the 50 States and the District of Columbia.

STATEMENT

On January 26, 1972, appellee Jesus Rodriguez Cintron, a resident of Puerto Rico, filed with the Social Security Administration an application under Section 228 of the Social Security Act, 42 U.S.C. 428, for special old-age benefits that are payable to persons 72 years of age or older who cannot satisfy the requirements for insured status under the Act. Those benefits, which are funded by general revenues rather than wage-earner contributions, are available only to the residents of "the 50 States and the District of Columbia." See Section 228(e) and (g) of the Act.

Appellee's application was initially denied by the Social Security Administration on March 10, 1972, because he failed to satisfy that residency requirement.

Appellee died on October 3, 1972, prior to the exhaustion of administrative remedies (App. D, *infra*, pp. 24a-25a). His death was not, however, called to the attention of the Social Security Administration, and on October 5, 1972, the denial of benefits was affirmed by an administrative law judge. On November 27, 1972, the Appeals Council determined that the previous actions were correct and denied further review.

On December 8, 1972, appellee's counsel filed suit on behalf of appellee, who was then deceased,[2] as the only named representative of an asserted class of Puerto Rican residents otherwise eligible for benefits under Section 228, seeking declaratory and injunctive relief on the ground that the statutory exclusion of Puerto Rican residents violated the Fifth Amendment. A three-judge court was convened pursuant to 28 U.S.C. 2282 and 2284, and the court certified the suit as a class action pursuant to Rule 23(c), Fed. R. Civ. P., with appellee named as the sole representative of the class.[3]

---

[2] The fact of appellee's death was not brought to the attention of the district court. The Social Security Administration learned of appellee's death after the notice of appeal to this Court had been filed.

[3] The class certified by the court consists of "all individuals [*sic*] residents of Puerto Rico who attained the age of 72 before 1968 or having attained said age after 1968, have had at least

On April 7, 1975, the district court, in a 2-1 decision,[4] held that the exclusion of residents of Puerto Rico from eligibility for benefits under Section 228 violated the Fifth Amendment, reasoning that such persons constitute a "discrete and insular minority" (App. B, *infra*, p. 12a) who may not be denied otherwise generally available social welfare benefits in the absence of a compelling governmental interest, and that no such interest supported the classification established by Section 228 (App. B, *infra*, pp. 15a-19a). The court thereupon enjoined the Secretary from denying benefits under Section 228 to otherwise eligible residents of Puerto Rico (App. B, *infra*, pp. 20a-21a).

MOTION TO VACATE

The judgment of the district court should be vacated and the case remanded to that court with instructions to dismiss the complaint for want of jurisdiction. There was no live plaintiff at the time the complaint was filed; appellee died on October 3, 1972, more than two months before the complaint was filed on December 8, 1972. Accordingly, appellee's claim was in fact moot before this suit was even

---

three (3) quarters of coverage of the Social Security Administration whenever acquired for each calendar year elapsing after 1966 and before the year said person attained such age, and are citizens of the United States or aliens lawfully admitted for permanent residence in the United States, including Puerto Rico" (App. A, *infra*, p. 1a).

[4] Chief District Judge Toledo and District Judge Pesquera (App. B, *infra*, pp. 3a-21a) formed the majority; Circuit Judge McEntee dissented (App. B, *infra*, pp. 21a-22a).

instituted. In consequence, the complaint failed to present the district court with a case or controversy within its jurisdiction under Article III of the Constitution. The district courts, like this Court, are "without power to decide moot questions." *St. Pierre* v. *United States*, 319 U.S. 41, 42.

The district court's certification of the suit as a class action did not cure this jurisdictional defect. Unlike the district court in *Sosna* v. *Iowa*, 419 U.S. 393, the district court here lacked jurisdiction to entertain the suit from its inception; the court had no jurisdiction even to act on the request for certification.[5]

THE QUESTION IS SUBSTANTIAL

The district court's decision on the constitutional merits is contrary to the principles established by prior decisions of this Court concerning Congress' power to legislate for the territories. Moreover, the court's rationale is so expansive that, if not overturned, it could obligate the Congress, under constitutional command, to extend all federal social welfare programs to residents of Puerto Rico.

The district court erred in reasoning that a statutory classification that denies particular social welfare benefits to residents of Puerto Rico is inherently

---

[5] In any event, the certification was improper in view of the fact that the unnamed members of the class had not satisfied the requirements of Section 205(g) of the Social Security Act. See *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975.

suspect and may be justified only by the showing of a compelling governmental interest. The classification is not "suspect." To the contrary, it is rooted in Article IV, Section 3, of the Constitution, which provides that "Congress shall have Power to * * * make all needful Rules and Regulations respecting the Territory * * * belonging to the United States." The power to legislate for the territories is "plenary" (*Hornbuckle* v. *Toombs*, 18 Wall. 648, 655), "full and complete" (*National Bank* v. *County of Yankton*, 101 U.S. 129, 133), and "well-nigh absolute" (*Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 314). Congress' plenary power over its dependencies allows it to differentiate, as it has done in Section 228 of the Social Security Act, between residents of Puerto Rico and the other territories, on the one hand, and residents of the United States, on the other. Accordingly, we question whether even the "rational basis" test traditionally applied to social welfare legislation (see *Weinberger* v. *Salfi*, *supra*) is applicable to classifications that distinguish between residents of the United States and residents of the territories.

In any event, the statutory classification here had a rational basis. The benefits payable under Section 228 are funded by general revenues, and residents of Puerto Rico do not pay federal income taxes. Congress could reasonably conclude that there should be a fair correspondence between statutory benefits and burdens, and therefore that benefits payable under Section 228 should not be extended to residents of Puerto Rico.

CONCLUSION

The judgment of the district court should be vacated and the case remanded to that court with instructions to dismiss the complaint. Otherwise, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

WILLIAM L. PATTON,
Assistant to the Solicitor General.

STEPHEN F. EILPERIN,
THOMAS S. MOORE,
Attorneys.

JULY 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 1099-72

JESUS RODRIGUEZ CINTRON, PLAINTIFF

vs.

ELLIOT RICHARDSON, Secretary of Health,
Education and Welfare, DEFENDANT

JUDGMENT

This action having been heard before the Court, Judges McEntee, Toledo and Pesquera sitting, and the issues having been duly heard and the opinion of the Court having been duly rendered, Judge McEntee dissenting;

It is adjudged that the term United States as defined in Section 228(e), Title II of the Social Security Act (42 USC 428(e)) is unconstitutional, invalid and unforceable [*sic*] against plaintiff and plaintiff's class (all individuals [*sic*] residents of Puerto Rico who attained the age of 72 before 1968 or having attained said age after 1968, have had at least three (3) quarters of coverage of the Social Security Administration whenever acquired for each calendar year elapsing after 1966 and before the year said person attained such age, and are citizens of the United States or aliens lawfully admitted for permanent residence in the United States, including Puerto

Rico), and defendant and his successors in office are hereby restrained and enjoined from excluding and rejecting applications for benefits under Section 228 of the Social Security Act filed or that may be filed by the members of plaintiff's class on the grounds that the applicants reside in the Commonwealth of Puerto Rico.

Defendant and his successors in office are further affirmatively ordered to make available, accept process and grant applications for said benefits filed by members of plaintiff's class who are otherwise qualified to receive said benefits under the terms of Section 228, Title II of the Social Security Act (42 USC 428) without regard to whether said applicants reside in the Commonwealth of Puerto Rico which term is hereby understood to be comprised within the definition of the term United States for the purpose of said section.

San Juan, Puerto Rico, April 7, 1975.

/s/ Jose V. Toledo
Chief District Judge

/s/ Hernan G. Pesquera
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 1099-72

JESUS RODRIGUEZ CINTRON, PLAINTIFF

vs.

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare,[1] DEFENDANT

OPINION

PESQUERA, D.J.

We are called upon to decide whether the Constitution of the United States bars Congress from excluding United States citizens who reside in Puerto Rico from welfare aid extended by Congress generally to the inhabitants of the fifty states and the District of Columbia.

Plaintiff challenges the exclusion of said United States citizens from benefits under Section 228,[2] 42

---

[1] Caspar Weinberger succeeded Elliot Richardson as Secretary of Health, Education and Welfare on February 8, 1973. Caspar Weinberger was substituted, therefore, for Elliot Richardson as the defendant in this suit. No further action need be taken to continue the suit by reason of the last sentence of Section 205(g) of the Social Security Act, 42 USC 405(g) (1970).

[2] The pertinent portion of Section 228 provides:

"(a) Every individual who—

USC Section 428, Title II of the Social Security Act, which extends certain monthly benefits to residents of the United States who attained the age of 72 before 1968 or had certain quarters of coverage whenever acquired for each calendar year elapsing after 1966 and before the year in which he attained the age of 72. Section 228(e) limits the term United States to the fifty states and the District of Columbia. The exclusion of citizens of the United States who reside in Puerto Rico from said benefits has been attacked by plaintiff as an invidious discrimination violative of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

The facts are not in dispute. Plaintiff Jesús Rodríguez Cintrón is a resident of the Commonwealth

---

(1) has attained the age of 72,

(2) (A) attained such age before 1968, or (B) has not less than 3 quarters of coverage, whenever acquired, for each calendar year elapsing after 1966 and before the year in which he attained such age,

(3) is a resident of the United States (as defined in subsection (e) of this section), and is (A) a citizen of the United States or (B) an alien lawfully admitted for permanent residence who has resided in the United States (as defined in section 410(i) of this title) continuously during the 5 years immediately preceding the month in which he files application under this section,

* * * *

(e) The benefit to which any individual is entitled under this section for any month shall not be paid if, during such month, such individual is not a resident of the United States. For purposes of this subsection, the term 'United States' means the 50 States and the District of Columbia."

of Puerto Rico who attained the age of 72 prior to 1968. He filed his application for benefits under Section 228, which was denied solely because he was not a resident of the United States within the meaning of Section 228 of the Social Security Act. After exhausting the appropriate administrative remedies without success, plaintiff timely brought the present action, claiming on his own behalf and on behalf of all persons similarly situated that the exclusion in Section 228 was an invidious discrimination violative of the equal protection principles incorporated in the Fifth Amendment of the Constitution of the United States. Plaintiff sought a declaratory judgment and an injunction against enforcement of the exclusion. He further requested that the case be certified as a class action. This Court was convened pursuant to 28 USC Section 2282 (1970) and the case was certified as a class action. The parties agreed to submit their arguments in the form of written memoranda. They have presented well reasoned and elaborate briefs for our consideration.

Plaintiff argues that the residents of Puerto Rico, as American citizens, are protected in their relation to the Federal Government by the fundamental principles of the Constitution of the United States, including the constitutional right to equal protection which has been read into the Fifth Amendment of the Constitution. He argues that the exclusion must be strictly scrutinized by this Court since welfare aid for the aged is a fundamental right and also that the exclusion of residents of Puerto Rico is a

suspect classification. He claims that in order for his exclusion from the benefits to withstand strict constitutional scrutiny, a compelling state interest justifying the exclusion must be shown. He further claims that such compelling interest is lacking and more so, that no rational relation between the purpose of the statute and the exclusion exists.

Conversely, the defendant argues that the congressional power under the territorial clause of the Constitution, Article IV, Section 3 allows Congress to decide which domestic laws are to be applicable to the Commonwealth of Puerto Rico and that in refusing to extend said welfare benefits to Puerto Rico, Congress is merely exercising its powers under the territorial clause. Therefore, defendant argues that no question of equal protection arises. Defendant further alleges that in any event the exclusion does not offend the due process clause of the Constitution. It is also advanced that as there is no fundamental right involved, there is no need to invoke the strict review doctrine and that under a lesser standard of review, given Congress' expansive authority in the area of social welfare, there is a rational justification for the exclusion taking into consideration that Puerto Rican residents are not liable to pay Federal income taxes generally.

At the outset,[3] we must deal once more with the recurring issue of the applicability of the United

[3] Indeed, in a preceding action involving the present controversy the former Chief Judge of the United States District Court for the District of Puerto Rico, Hiram R. Cancio, dismissed an identical claim inter alia holding the Constitution of the United States was inapplicable to the Commonwealth of Puerto Rico. See Murga Murga v. Richardson, Civil No. 351-70, U.S. District Court for the District of Puerto Rico, decision by Judge Hiram R. Cancio, December 30, 1971 (No. 72-1053 U.S. Circuit Court of Appeals).

States Constitution to the Commonwealth of Puerto Rico. We do not think it necessary to repeat again at length what was said about this issue in *Montalvo* v. *Colón*, 377 F.Supp. 1332 (1974) in dealing with the applicability of Supreme Court decisions to Puerto Rico. There a three judge court amply discussed the evolution of the applicability of constitutional principles to Puerto Rico, beginning with the Insular cases, especially *Downes* v. *Bidwell*, 182 US 244 (1901) and the later case of *Balzac* v. *Puerto Rico*, 258 US 298 (1922) and concluding with recent cases at the District Court level.[4] The Court concluded in *Montalvo* v. *Colón*, supra, that:

> "These cases, particularly *Balzac*, clearly indicate that the right to due process of law applies in such territories, and indicate somewhat more generally that other fundamental rights, such as the right to freedom of speech also apply."

The three judge court in *Montalvo* v. *Colón*, supra, further found that the advent of the Commonwealth

[4] See *Ortiz* v. *Hernández Colón*, 385 F. Supp. 111 (DPR 1974) (three judge court); *Marín* v. *University of Puerto Rico*, 377 F. Supp. 613 (DPR 1973) (three judge court); *Cintrón* v. *State Board of Education*, 384 F. Supp. 674 (DPR 1974) (three judge court).

of Puerto Rico in 1952 did not alter the applicability of fundamental rights contained in the Constitution of the United States to the Commonwealth. It quoted *Mora* v. *Mejia*, 206 F.2d 377, 382 (1st Cir. 1953), which in turn had been quoted by the Supreme Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 US 663.

> "No doubt under the Organic Act of 1917, . . . the insular government was subject to the due process clause of the Fifth Amendment . . . The government of the newly created Commonwealth of Puerto Rico is subject to the applicable provision of the Constitution of the United States. That must mean that the people of Puerto Rico, who remain United States citizens, are entitled to invoke against the Commonwealth of Puerto Rico the protection of the fundamental guarantee of due process of law, as provided in the federal Constitution. For our present purpose it is unnecessary to determine whether it is the due process clause of the Fifth Amendment or that of the Fourteenth Amendment which is now applicable; the important point is that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States."

The present case is, of course, different from *Mora* v. *Mejia*, supra, and *Montalvo* v. *Colon*, supra, in that said cases dealt with conduct of the Commonwealth of Puerto Rico as applied to residents of the Commonwealth. Here the Constitution of the United States is invoked against action of the Federal Government challenged as violative of the Fifth Amendment of the Constitution. The principle stated in *Mora* v. *Mejia*, supra, to the effect that there cannot exist under the American flag any governmental authority untrammeled by the requirement of due process of law is equally applicable to the Federal Government in relation to United States citizens in the Commonwealth of Puerto Rico, the territorial powers under Article IV, Section 3 notwithstanding. *Reid* v. *Covert*, 354 US 1 (1956).[5]

Thus, we hold that the Fifth Amendment of the Constitution binds the Federal Government in its exercise of power over the residents of Puerto Rico and that American citizens who are residents of Puerto Rico are entitled to benefit from the principles of equal protection read into the Fifth Amendment of the Constitution. *Reid* v. *Covert*, supra; *Bolling* v. *Sharpe*, 347 US 497 (1954); *Shapiro* v. *Thompson*, 394 US 618 (1969); *Schneider* v. *Rusk*, 377 US 163 (1963).

Having focused on the applicability issue, we now consider and rule on the specific constitutional question before us: whether the exclusion complained of

---

[5] In *Reid* the Supreme Court said that the Insular cases were to be distinguished in that "they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion."

by plaintiff contravenes the Fifth Amendment, which forbids discrimination that is so unjustifiable as to be violative of due process. *Schneider* v. *Rusk*, supra.

Section 228 of the Social Security Act, also known as the Prouty Amendment to the Tax Adjustment Act of 1966, was intended basically to extend social security protection to some 1.5 million Americans who were excluded from the social security system, either because their jobs were not covered by social security during their working years or because they retired before their jobs were covered by the social security system. As originally proposed by Senator Prouty, the amendment would have conferred upon about 1.5 million citizens seventy years or more old monthly benefits of $45.00 plus $22.50 for their spouses. The amendment was originally intended to include all residents of the United States as defined in Section 210(I) of the Social Security Act, in which the term United States includes the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and American Samoa. The measure was the subject of debate in the Senate. The proponents supported the measure to fight poverty among the aged, 112 Cong. Rec. 5290, and as a step to some kind of basic social security available to everyone, 112 Cong. Rec. 5292. The funds to finance the provision would have come initially out of the Federal Old Age and Survivors Insurance Trust Fund which would have been reimbursed by the General Treasury. See 113 Cong. Rec. 5289. The opponents of the measure argued that such appropriations would

put the budget further out of balance. See 112 Cong. Rec. 5929.

After the Senate approved the Prouty Amendment by a slim margin, it went to conference with the House of Representatives which narrowed the definition of the term residents of the United States to exclude the residents of Puerto Rico, Virgin Islands, Guam and American Samoa. As a result of this exclusion, as well as other amendments, the number of persons covered by the provision was reduced from 1.5 million to 370,000 and the expected cost of the provision in its first year was reduced from 700 million to 95 million dollars, see 112 Cong. Rec. 5291-92, 5792-93, 5946. The legislation as recommended by the conference committee was passed by both houses of Congress, 112 Cong. Rec. 5801, 5870 and became law upon the signature of the President, 112 Cong. Rec. 6273.

The legislative history of the provision reveals that in enacting Section 228, Congress established a national program of benefits for the needy aged not covered under other governmental plans, but limited its original scope by reason of its cost. The legislative history reveals no grounds other than that of cost to explain the exclusion of residents of Puerto Rico from the program's benefits.

We must reject the claim that welfare aid to the aged is a fundamental right under the Constitution of the United States. See *San Antonio Independent School District* v. *Rodriguez*, 411 US 1 (1973); *Dandridge* v. *William*, 397 US 471 (1970); *Richardson* v.

Belcher, 404 US 78 (1971). But a claim that the statute creates a classification that excludes a suspect class is a much more serious question. The residents of Puerto Rico considered as a class have the indicia of suspectness necessary to invoke the strict scrutiny test and qualify as an example of a "discrete and insular minority for whom such heightened judicial solicitude is appropriate". See *Graham* v. *Richardson*, 403 US 371, 375 (1971).

Although the residents of Puerto Rico were granted full citizenship in 1917, their political condition within the American system of government can hardly be considered equal. In spite of the fact that the Commonwealth has obtained a large measure of self government and its own constitution, see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, supra, with respect to the acts of the Federal Government, executive or legislative United States citizens residing there are completely disenfranchised. In *San Antonio Independent School District*, supra, the Supreme Court defined a suspect class as one saddled with such disabilities or subjected to a history of unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 411 US at 28. With regard to federal legislation which is generally applicable to Puerto Rico, the residents of the Commonwealth are completely powerless and are in a position similar to that of the District of Columbia. *United States* v. *Thompson*, 452 F2d 1333 (1971), Cert. denied, 405 US 1075 (1972). There, the United

States Court of Appeals for the District of Columbia Circuit stated at page 1340:

> "What is involved here is not just any arbitrary classification between two similarly situated groups. The residents of Washington occupy a profoundly anomalous position in the federal system, and any classification which discriminates against them is particularly suspect. Writing for the Court in Reynolds v. Sims, supra, Chief Justice Warren observed: 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that "right strike at the heart of representative government.' But for the residents of the District, the right to vote in congressional elections is not merely restricted—it is totally denied.
>
> * * * *
>
> Although the courts have a vital role to play in preserving our constitutional rights, we normally depend upon the vote as 'preservative of other basic civil and political rights.' Minorities can usually protect themselves by playing their role in the political process and forming coalitions with other groups to secure a majority. But it is senseless to remit District residents to the political process, since for them there is no political process. The principle of majority rule loses its legitimacy when not all the votes are counted. See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1124-1126 & n.275 (1969). In this context, at least, the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely de-

tached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating. Therefore, discriminatory classifications affecting District residents must be subjected to the strictest possible review."

The Court had also said at page 1339:

". . . when Congress decides to enact national legislation, the situation is fundamentally different. The passage of such a law implies a threshold decision to override regional differences in favor of a uniform standard that will govern the entire country. If one small isolated group is then excluded from the operational effect of the statute, the rationality of that exclusion is highly suspect."

Defendant contends that the exclusion was not intended to apply to residents of Puerto Rico as a class, as it also excludes those from Virgin Islands, Guam, and American Samoa and that residents of Puerto Rico would not be excluded from the benefit should they live in the fifty states or the District of Columbia. Defendant argues that the classification is based on geography and not to discriminate against American citizens who reside in Puerto Rico. This reasoning we must reject as fallacious. The simple fact that in order to receive the benefits American citizens residing in Puerto Rico would have to move out to the fifty states or the District of Columbia is tantamount to discriminatory treatment. Although the exclusion applied is designed in terms of geographical

exclusion, the effect of the exclusion is on the American citizens who are residents of Puerto Rico.

Defendant further argues that as Puerto Rico is not a state, its residents cannot demand all of the rights and privileges afforded to the residents of the United States, specially when they are not subject to the payment of Federal income taxes. It is the contention of defendant that Congress can limit the grant of benefits to the residents of the fifty states and the District of Columbia in order to balance the payment of those benefits against taxes imposed on them. It is further claimed that the extension of the benefits granted under Section 228 of the Act to the citizens who reside in Puerto Rico would have to be almost totally financed by non-resident citizens, thereby resulting in a gratuity to the residents of Puerto Rico.

We fail to find in such arguments either a compelling state interest or even a rational relation to the purpose of the statute.

The concern of Congress for the cost of the program cannot justify an invidious discrimination. In *Shapiro* v. *Thompson*, supra, the Supreme Court said:

"We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children

> from its schools. Similarly, in the cases before us, appellant must do more than show that denying welfare benefits to non residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification."
> 394 US at 633.

The same concern for fiscal integrity was rejected in *Graham* v. *Richardson*, 403 US 371 (1971) and in *Morton, Secretary of the Interior* v. *Ruiz*, 415 US 199 (1974). In the latter case, the Supreme Court said:

> "Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."
> 415 US at 231.

The given fact that the residents of Puerto Rico are not generally liable to pay Federal income taxes does not afford the missing compelling state interest nor does it present a rational relation to the purposes to be accomplished by the statute.

Given the purpose of Section 228 to create a national program of some basic economic aid to elderly American citizens who had been left out of the social security system, to exclude a considerable number of otherwise qualified American citizens will not rationally advance the purpose of the statute. Such exclusion does not appear to be imperative or compelling. Residents of Puerto Rico have been a part of the social security system since 1950 and have contributed to the system in the same manner that the residents of the fifty states and the District of Columbia. Puerto Rico too has elderly residents wo [*sic*] have been left out of the social security system.[6] And the elderly of Puerto Rico are not inmune [*sic*] from the affliction of poverty in old age.[7]

The fact that Congress has not extended the internal revenue laws to Puerto Rico and therefore

---

[6] According to the census of 1970, there were around 28,368 persons who had reached seventy two before 1968. This group included 13,354 males and 14,512 females. See General Population Characteristics, Puerto Rico, 1970, US Department of Commerce, PC (1), P. 53, PRP 5352, 53.

[7] "The impact of inflation has been especially severe on Puerto Rico because of its geography, the nature and stage of development of its economy. Having an area of only 3,435 square miles, a population density of over 850 persons per square mile, with limited agricultural land and few indigenous raw materials, Puerto Rico imports the bulk of its basic commodities. Basic commodity shortages, both real and artificial, have been the root cause of the present worldwide inflation. Puerto Rico imports most of its commodities from the United States. Their prices in Puerto Rico have been further inflated by the 47 per cent increase in ocean freight rates granted to carriers during the past two years.

exempts Puerto Rican residents generally from the payment of Federal income taxes does not supply any valid justification compelling or otherwise. For the situation is like that presented in *Shapiro* v. *Thompson*, supra, where the Supreme Court stated:

> "Appellants' reasoning would logically permit the state to bar new residents from schools, parks and libraries or deprive them of police or fire protection. Indeed it would permit the state to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportion of state services." 394 US at 632.

It concluded that the limitation of welfare benefits to those regarded as contributing to the state was not a constitutionally permissible state objective.

We may add that to take the fact of nonpayment of taxes into consideration for the purposes of vali-

---

"Everywhere, the poor are hardest hit by inflation and economic stagnation. More of their income is spent for the basic foods and they are the first to lose their jobs and the last to be reemployed. In Puerto Rico, per capita personal income is currently only one-third the U.S. average and the 1970 Census showed that 60 per cent of all Pureto Rican families were below the U.S. 'poverty threshold'. During fiscal year 1974 the island experienced an average inflation rate of 12.6 per cent. However, during the first semester of calendar 1974 the average increase in prices was over 13 per cent. Inflation has been particularly severe in the case of imported foodstuffs." Commonwealth Government Report, *Inflation and the Economy of Puerto Rico*, submitted for consideration at President Ford's economic summit meeting in Washington, September 27, 1974.

dating the exclusion is antithetical to the moral and constitutional principles upon which our nation is based and repugnant to the idea of equality of all its citizens. American citizens residents of Puerto Rico may be called into the Armed Forces and have given many lives in the defense of the nation. They have migrated through and lived in many states, working in the several states and contributing to the growth and culture of the nation. See *Graham* v. *Richardson*, supra. It has been said by a scholar in the mater:

> "Realistically reviewed, Puerto Rico, both before and after Commonwealth, has long been integrated into the network of national legislation and national economic relationships. With the exception of Federal tax laws, the Interstate Commerce Act and a few federal statutes of lesser significance, almost all national legislation applies to Puerto Rico. Similarly, almost everything Puerto Rico sells and practically everything which is purchased from outside the Island, is to and with the United States national economy." Helfeld, *How Much of the Federal Constitution is Likely to be Held Applicable to Puerto Rico?*, 39 Revista Jurídica de la Universidad de Puerto Rico 169 n. 88 (1970).

The United States of America is more than anything a community of American citizens and not merely a conglomerate of geographical entities. All the citizens of a community are entitled to equal and full citizenship. As clearly stated in *Schneider* v. *Rusk*, 377 US 163 (1964):

> ". . . while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' Bolling v. Sharpe, 347 U.S. 497, 499. . . . The discrimination addressed at naturalized citizens drastically limits their rights to live and work abroad in a way other citizens may. It creates indeed a second class citizenship."

The proposition of a second class citizenship was early rejected by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

> "For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; . . ."

We would not be acting in the best tradition of American jurisprudence if we tried to justify or rationalize something that is repellent to the judicial instinct of equality and justice for all.

Accordingly, we conclude that the definition of the term United States as defined in Section 228(e), Title II of the Social Security Act is unconstitutional and void and that the enforcement of such definition and exclusion of United States citizens who reside in Puerto Rico contained in said section must be and is hereby enjoined. Plaintiff's class[8] covered by the

[8] The class herein designated comprises all individuals residents of Puerto Rico who attained the age of seventy two years before 1968 or having attained said age after 1968 had at least three (3) quarters of coverage of the Social Security Administration whenever acquired for each calendar year elapsing after 1966 and before the year said persons attained such age, and are citizens of the United States or aliens lawfully admitted for permanent residence in the United States.

present action is entitled to apply for benefits under Section 228 considered without taking into consideration whether they are residents of Puerto Rico and should receive the benefits if otherwise duly qualified.

/s/ Jose V. Toledo
Chief District Judge

/s/ Hernan G. Pesquera
District Judge

McENTEE, *Circuit Judge* (dissenting). After prolonged reflection I find I cannot agree with the decision of the majority in this case and therefore briefly dissent for the following reasons. Puerto Rico occupies a unique position in relation to the United States, Leibowitz, *The Applicability of Federal Laws for the Commonwealth of Puerto Rico*, 56 Geo. L.J. 219, 270 (1967). It has never been held, and I cannot subscribe to the proposition, that residents of Puerto Rico constitute a suspect class for equal protection purposes, *see* Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 12-15 (1972); Puerto Rico's singular status makes analogy to the District of Columbia unpersuasive. Provided it does

not resort to invidious distinctions, Congress has a valid interest in preserving the fiscal integrity of its welfare programs. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). Although Puerto Rico has received less favorable treatment than the states under a number of other social programs, Leibowitz, *supra* at 269-70, this discrimination apparently has never been thought to be amenable to equal protection challenge. Although I sympathize with the plight of the plaintiff class, I would dismiss the complaint.

/s/ Edward M. McEntee
United States Circuit Judge

Filed April 7, 1972

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 1099-72

JESUS RODRIGUEZ CINTRON, PLAINTIFF

v.

SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C., Sections 1252, 1253, and 2101, from the judgment of the three-judge court entered in this action on April 7, 1975.

San Juan, Puerto Rico, April 30, 1975.

JULIO MORALES SANCHEZ
United States Attorney

IGNACIO RIVERA CORDERO
Assistant U. S. Attorney

APPENDIX D

ESTADO LIBRE ASOCIADO DE PUERTO RICO

DEPARTAMENTO DE SALUD

NEGOCIADO DEL REGISTRO DEMOGRÁFICO Y ESTADÍSTICAS

VERIFICACION CERTIFICADA DE ACTA DE DEFUNCION

(Ley Núm. 111 del 30 de junio de 1957)

CERTIFICO que en la sección de DEFUNCIÓN del Registro Demográfico Núm. 16 de Cataño, P. R., a mi cargo, aparece la siguiente inscripción:

Libro Núm.	Folio Núm.	Acta Núm.	Fecha de Inscripción:
18	81	--	4 de octubre, 1972

Nombre del Fallecido: Jesus Rodriguez Cintrón — Fecha de Defunción: 3 de octubre, 1972

Nombre del Padre: José Rodriguez — Nombre de la Madre: Agustina Cintrón

Abuelo Paterno: No consta — Abuela Materna: No consta

Solicitante: Ramón Rodriguez — Dirección: E-15-A-151, Cataño, P.R.

Si para uso de una Agencia del Gobierno Estatal o Federal. Nombre de la Agencia: — Si veterano, licenciamiento honorable Núm.

ADVERTENCIA

Esta verificación certificada de acta de DEFUNCIÓN no será válida si en la misma no se ha estampado el sello oficial del Registro Demográfico correspondiente. También se requiere la cancelación de un sello de rentas internas de 50c, según exige la ley, excepto en aquellos casos en que la verificación se expida para uso exclusivo de un veterano o de una Agencia del Gobierno del Estado Libre Asociado de Puerto Rico o de los Estados Unidos de América.

Esta verificación no será válida si en la misma aparecen tachaduras, borraduras o alteraciones.

Fecha de Expedición: 5-15-75 — Municipio de Cataño, P. R.

Encargado del Registro: Estilita Trigtani Rodriguez — Firma del Registrador

Nombre en maquinilla o letra de Molde

24a

BEST COPY AVAILABLE

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF HEALTH
DEMOGRAPHIC AND STATISTICS BUREAU

(Law No. 111 of June 3, 1957)

I certify that in the Demographic Register of Death, section No. 16 of Cataño, P.R., appears the following registration:

Book No	Page No.	Date of Registration:
18	81	October 4, 1972

Name of the deceased
Jesús Rodríguez Cintrón

Date of Death:
October 3, 1972

Father's name
José Rodríguez

Mother's name
Agustina Cintrón

Paternal grandfather
n/s

Maternal grandmother
n/s

Applicant
Ramón Rodríguez

Address
E-15-A-151, Cataño, P.R.

Date of issue:
5-15-75

Municipality of
Cataño, P.R.

Registrar
Estilita Tristani Rodríguez

/s/ Albert A. Serrano
Public Information Specialist
Authorized translator

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 588575 5